STATE OF MICHIGAN

COURT OF APPEALS

CATRINA GEE, as Next Friend of DIAMOND GEE, a Minor,

Plaintiff-Appellant,

v

VOLNA CLERMONT, M.D., HOWARD MEDICAL SERVICES, P.C., and ASSOCIATED HEALTH CARE CENTER, P.C.,

Defendants-Appellees,

and

SINAI HOSPITAL,[1]

Defendant.

UNPUBLISHED
April 15, 2008

No. 275771
Wayne Circuit Court
LC No. 04-407557-NH

Before: Jansen, P.J., and Donofrio and Davis, JJ.

PER CURIAM.

Plaintiff appeals by right following the jury verdict of no cause of action and the trial court's order denying plaintiff's motion for judgment notwithstanding the verdict (JNOV).[2] We affirm.

Plaintiff's first argues that the trial court abused its discretion by denying her motion for a new trial on the ground that the verdict was against the great weight of the evidence. A motion for a new trial on the ground that the verdict was against the great weight of the evidence is reviewed for an abuse of discretion, and substantial deference is given to the trial court's ruling that the verdict was not against the great weight of the evidence. *Campbell v Sullins*, 257 Mich

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[1] All claims against defendant Sinai Hospital were dismissed by way of a stipulated order.

[2] All references to "defendant" refer to Dr. Volna Clermont. The remaining defendants-appellees face potential derivative liability only.

App 179, 193; 667 NW2d 887 (2003). The trial court should not substitute its judgment for that of the jury unless the record reveals that the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand. *Id*.

In a medical malpractice case, the plaintiff bears the burden of proving (1) the applicable standard of care, (2) breach of that standard by the defendant, (3) injury, and (4) proximate causation. *Wischmeyer v Schanz*, 449 Mich 469, 484; 536 NW2d 760 (1995). Plaintiff contends that the jury's finding that defendant did not deviate from the standard of care was against the great weight of the evidence. For the reasons set forth below, we disagree.

We concede that a rational jury likely could have concluded in this case that defendant breached the standard of care and contributed to the worsening of plaintiff's asthma. However, the critical question is not whether there was sufficient evidence to support plaintiff's malpractice claim, but rather whether the evidence preponderated so heavily against the no-cause-of-action verdict that it would have been a miscarriage of justice to allow the verdict to stand. There is merit to defendant's contention that the standard of care cannot be viewed in a vacuum. Defendant's actions, while they may have appeared negligent in isolation, appear much less so when viewed in context. For instance, defendant's failure to make an official asthma diagnosis until November 2000 might well be explained by the fact that plaintiff's pre-2000 asthma symptoms were reasonably associated with upper respiratory infections and were treated by defendant as such. Defendant's expert pediatrician agreed that many of plaintiff's symptoms early in life corresponded to non-asthma conditions, such as colds or infections. Also, all medical experts acknowledged the difficulty in diagnosing a young child with asthma.

Additionally, there were long periods of time when plaintiff appeared healthy and did not complain of any asthma-related problems. From February 1995 until February 1998, plaintiff visited defendant several times, and none of these visits involved asthma-related concerns. There was another gap in asthma-related treatment from November 2000 until February 2002. One expert testified that where, as here, there are large gaps between complaints of asthma-like symptoms, it is reasonable for a doctor to conclude that the patient does not have asthma or alternatively that the patient's asthma is well-controlled and does not require medication.

Furthermore, the jury could have reasonably found that plaintiff's noncompliance with defendant's instructions made it impossible for defendant to comply with the standard of care generally applicable in the treatment of asthma patients. Several times throughout plaintiff's treatment, plaintiff did not follow up with defendant as directed. Moreover, there was evidence that plaintiff did not inform defendant of her emergency room visits, thus negatively affecting defendant's ability to properly assess plaintiff's condition. Defendant and defendant's expert testified that when a patient does not cooperate with a doctor's instructions, it becomes exceedingly difficult for the doctor to comply with the standard of care. Defendant maintained that he acted reasonably in his treatment of plaintiff, and defendant's expert agreed.[3] It is the

[3] Although the expert initially testified that defendant did not take certain actions required under the standard of care generally applicable in treating asthmatic patients, he later opined that defendant acted reasonably in treating plaintiff given the totality of the circumstances and the (continued…)

province of the jury to weigh the competing testimony and to decide which expert to believe. See *Detroit v Larned Associates*, 199 Mich App 36, 41; 501 NW2d 189 (1993). There was sufficient evidence from which a jury could have determined that defendant did not deviate from the standard of care, and we cannot conclude that the evidence so heavily preponderated against the jury's verdict that it would have been a miscarriage of justice to allow the verdict to stand. The trial court did not abuse its discretion by denying plaintiff's motion for a new trial.

Plaintiff also argues that the trial court erred in denying her motion for JNOV. We disagree. We review de novo the trial court's grant or denial of a motion for JNOV, viewing the evidence in the light most favorable to the nonmoving party. *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491-492; 668 NW2d 402 (2003). If the evidence is such that reasonable minds could differ, the question is one for the jury and judgment notwithstanding the verdict is improper. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998).

As noted above, plaintiff bears the burden of proving the following in a medical malpractice action: (1) the applicable standard of care, (2) breach of that standard by defendant, (3) injury, and (4) proximate causation. *Wischmeyer*, *supra* at 484. Viewing the evidence in a light most favorable to defendant, a rational jury could have found that defendant did not deviate from the standard of care. As detailed above, plaintiff's pre-2000 asthma symptoms were reasonably associated with an upper respiratory infection and treated by defendant as such. Further, defendant's expert testified that where there are large gaps between complaints of asthma-like symptoms—like there were in the instant case—it is reasonable for a doctor to conclude that the patient does not have asthma or that the patient's asthma is well-controlled and does not require medication. Finally, the jury could have reasonably found from plaintiff's noncompliance with defendant's instructions that it was impossible for defendant to comply exactly with the standard of care normally applicable in asthma cases. Because reasonable minds could have differed with respect to whether defendant breached the applicable standard of care, the trial court properly denied plaintiff's motion for JNOV. *Central Cartage*, *supra* at 524.

Further, even assuming arguendo that defendant deviated from the standard of care in this case, there was credible evidence from which a rational jury could have found that this deviation was not the proximate cause of plaintiff's condition. At least one pediatrics expert opined that plaintiff's asthma was not negatively affected by defendant's treatment or lack of treatment, and the jury was entitled to believe this testimony. *Larned Associates*, *supra* at 41. In short, reasonable minds could have differed with respect to whether defendant's actions proximately caused plaintiff's condition. Accordingly, the trial court properly denied plaintiff's motion for JNOV for this reason as well. *Central Cartage*, *supra* at 524.

Affirmed.

/s/ Kathleen Jansen
/s/ Pat M. Donofrio
/s/ Alton T. Davis

(…continued)

information available to defendant during each particular visit with plaintiff.